



December 17, 1999

Mr. David A. Anderson
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR99-3661

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130373.

The Texas Education Agency (the "agency") received a request for a copy of all proposals submitted and all finalist presentation materials submitted in response to the Request for Proposals to provide "Investment Consultant Services for the Texas Permanent School Fund." You claim that the requested information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Since the property and privacy rights of third parties may be implicated by the release of the requested information, you notified those companies whose information is responsive to the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Three companies responded to the notification: New England Pension Consultants ("New England"), Richards & Tierney, Inc. ("R&T"), and Holbein Associates, Inc. ("Holbein").¹

The remaining four companies whose information is responsive to this request did not respond to our notice; therefore, we have no basis to conclude that these companies' information is excepted from disclosure. *See* Gov't Code § 552.110(b) (to prevent disclosure

¹We note that the agency did not submit as responsive to this request any information relating to Holbein. Therefore, this ruling does not address the public nature of Holbein's proposal information.

of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). The proposal information for Summit Strategies Group, William M. Mercer Investment Consulting, Inc., Asset Consulting Group, Inc., and Salomon Smith Barney must, therefore, be released to the requestor.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 also encompasses the doctrine of common-law privacy. After reviewing the submitted materials and arguments, we do not believe that the requested information must be withheld based on a right of privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (common-law privacy); Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)) (constitutional privacy). Common-law privacy protects the rights of individuals, not corporations. Open Records Decision No. 620 (1993). Corporations do not have a right to privacy. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co., Inc.*, 777 S.W.2d 434, 436 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)); *see* Open Records Decision No. 192 (1978) (stating that right of privacy protects feelings and sensibilities of human beings, and does not protect evaluation report on private college). Thus, the companies have no right of privacy in their financial information. Moreover, we are not aware of, nor has the agency referred us to, any statute outside the Public Information Act that would make the requested information confidential. Therefore, we conclude that the requested information is not excepted from disclosure under section 552.101.

Section 552.104 of the Government Code excepts from required public disclosure “information which, if released, would give advantage to competitors or bidders.” The purpose of section 552.104 is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. Open Records Decision No. 541 (1990). Section 552.104 does not, however, protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. Although the agency asserts section 552.104, the agency does not explain how the release of the requested information will affect a competitive bidding situation. By failing to do so, the agency has waived its section 552.104 protection.² *Id.* (Gov’t Code § 552.104 may be waived by governmental body). Accordingly, the

²R&T argues that this office should address on its own initiative the applicability of section 552.104 to the requested materials. We note that section 552.104 is a discretionary exception. This office is not authorized to raise or argue discretionary exceptions on behalf of governmental bodies. *See* Open Records Decision Nos. 344 (1982), 325 (1982).

requested information may not be withheld under this exception.

Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The Texas Supreme Court has adopted the definition of “trade secret” from the Restatement of Torts, section 757, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the “trade secrets” branch of section 552.110 to requested information, we accept a private person’s claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).

As for the commercial or financial information prong of section 552.110, the governmental body or interested third party must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from the disclosure of the requested information. An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *See generally National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The entity must provide specific factual evidence that substantial competitive injury will occur as a result of the release of the information at issue.

After reviewing the arguments presented by New England, we conclude that the company has not established that its proposal information is excepted from disclosure under section 552.110. *See* Open Records Decision Nos. 479 (1987) (information is not confidential under Public Information Act simply because party submitting it anticipates or requests that it be

kept confidential), 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110). The agency must, therefore, release New England's proposal information in its entirety to the requestor. However, after a review of R&T's arguments, we conclude that the company has demonstrated that portions of its proposal are protected by section 552.110. Thus, the agency must withhold the following sections of R&T's proposal: pages 12-13, section D of page 15, Exhibits E, F, G, H, I, and Section VII. The remaining portions of R&T's proposal must, however, be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

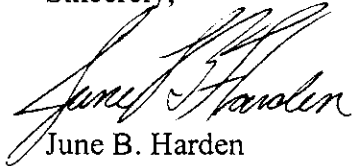
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.-Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "June B. Harden".

June B. Harden
Assistant Attorney General
Open Records Division

JBH/jc

Ref: ID# 130373

Encl. Submitted documents

cc: Mr. Tobin E. Olson
Cox & Smith
112 East Pecan Street, Suite 1800
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(w/o enclosures)